Third District Court of Appeal

State of Florida, July Term, A.D. 2007

Opinion filed September 5, 2007.
Not final until disposition of timely filed motion for rehearing.

No. 3D06-458
Lower Tribunal Nos. 04-520 AP and
02-2197

United Automobile Ins. Co.,
Petitioner,

vs.

Custer Medical Center
(a/a/o Maximo Masis),
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Jennifer Bailey, Marc Schumacher and Scott Silverman, Judges.

Michael J. Neimand, The Office of the General Counsel, for petitioner.

Stephens, Lynn, Klein, et al., and Marlene S. Reiss, for respondent.

Before GERSTEN, C.J. and SHEPHERD and ROTHENBERG, JJ.

SHEPHERD, J.

Petitioner, United Automobile Insurance Company, seeks certiorari review of a circuit court appellate division opinion that reverses a directed verdict rendered in United's favor at the conclusion of the plaintiff-assignee's, Custer Medical Center case. The trial court's reason for directing the verdict was that United's insured and assignor, Maximo Masis, failed to satisfy a contractual condition precedent under the policy of insurance sued upon, by failing to report for two consecutive independent medical examinations without explanation. The facts presented are not in dispute. We conclude the decision of the circuit court appellate division departed from the essential requirements of law and quash the decision under review.

On January 1, 2002, Maximo Masis was injured in an automobile accident. At the time, he was insured for personal injury protection benefits under an insurance policy issued by United Automobile Insurance Company with a $10,000 limit. Also in January, Masis sought medical treatment from Custer, and Custer submitted bills for treatment of Masis to United. Custer then sought payment from United.

United responded to Custer's request for payment with a certified letter to Masis' counsel, notifying him that United had scheduled an independent medical examination for his client on April 11, 2002. United also mailed a copy of the letter to Masis. Masis did not appear. On April 12, 2002, United scheduled a

second independent medical examination for April 29, 2002, employing the same methods of notification. Again, Masis failed to appear. Neither Masis nor his counsel communicated with United in response to the notices.

After three weeks had passed from the scheduled date for the second examination, United wrote to Masis' counsel, advising it was denying personal injury protection benefits to Masis as of April 11, 2002, for Masis' failure to appear. On June 20, 2002, Masis' counsel sent United a letter announcing his withdrawal of his representation of Masis. Thereafter, Custer, as Masis' assignee, sued United for $1,250 in excess of the deductible for services rendered by it, together with attorney fees and costs pursuant to section 627.428 of the Florida Statutes (2006).

Section 627.736(7), Florida Statutes (2006) provides:

> (a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall, upon the request of an insurer, submit to mental or physical examination by a physician or physicians. The costs of any examinations requested by an insurer shall be borne entirely by the insurer.
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> (b) . . . If a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits.

Construing this statute, this court long ago held in identical circumstances that an insured's failure to comply with a condition precedent that he appear for an

independent medical examination constituted grounds to enter judgment for the insurer. In Griffin v. Stonewall Ins. Co., 346 So. 2d 97, 98 (Fla. 3d DCA 1977), a claimant-insured failed to appear on two occasions for independent medical examinations required by a personal injury protection policy issued by Stonewall Insurance Company. Just as in this case, "[n]o reason or excuse for such refusal to appear was furnished at the time, nor was any reasonable excuse advanced before the trial court." Id. We concluded there was no genuine issue of material fact and affirmed a summary judgment entered in favor of the insurer. See also Goldman v. State Farm Gen. Ins. Co., 660 So. 2d 300, 301 (Fla. 4th DCA 1995)(insurer entitled to summary judgment for failure of insureds to appear for rescheduled examinations under oath required as a condition precedent to suit under homeowner's policy, regardless of prejudice).

Based on Griffin, we conclude the circuit court appellate division departed from the essential requirements of law. Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003)("A district court [may] exercise its discretion to grant certiorari review o*nly* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice"); accord Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 528 (Fla. 1995); Combs v. State, 436 So. 2d 93, 96 (Fla. 1983).

We grant the petition for writ of certiorari, quash the opinion of the circuit court appellate division, and direct that court to reinstate the directed verdict.